86 - 1414

No. _____

Supreme Court, U.S.
FILED
FEB 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF OREGON

Petitioner,

v.

MARY SETTLER,
CARL SETTLER, and
RANDY ALVIN SETTLER,

Respondents.

Petition for Writ of Certiorari to the Court of Appeals of the State of Oregon

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
*VIRGINIA L. LINDER
Solicitor General
MICHAEL D. REYNOLDS
Assistant Solicitor General
LINDA DeVRIES GRIMMS
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Petitioner

*Counsel of Record

30 pp

QUESTION PRESENTED

When a state and a tribe have adopted parallel regulations limiting the off-reservation fishing rights of tribal members, and a tribal member violates those regulations, is the state required to prove the conservation necessity of its regulations in a state criminal prosecution of the tribal member?

TABLE OF CONTENTS

Page

Question Presented i

Petition for Certiorari 1

Opinions Below 1

Jurisdiction 1

Treaties, Statutes and Regulations Involved 1

Statement of the Case

I. Facts 4

II. Raising and Preserving Federal Question 5

Reasons for Allowance of Writ 7

I. The state/tribal conflict which in prior cases prompted this Court to require states to prove conservation necessity does not exist here 8

II. Tribal members who fish in violation of tribal regulations that delineate or allocate the tribe's treaty fishing right act outside of their treaty rights and are subject to prosecution under state law like other citizens 11

III. The issue presented needs definitive resolution by this Court 14

Conclusion 16

Appendix A

Oregon Court of Appeals Opinion App-1

Appendix B

Oregon Supreme Court Order App-5

TABLE OF AUTHORITIES

Page

Cases Cited

Antoine v. Washington, 420 U.S. 194 (1975) 9

Delaware Indians v. Cherokee Nation, 193 U.S. 127 (1904) 11

N. Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976) 11

Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968) 8-9

Puyallup Tribe v. Washington Dep't of Game, 433 U.S. 165 (1977) 11,14

Sac & Fox Indians (Iowa) v. Sac & Fox Indians (Oklahoma), 220 U.S. 481 (1911) 11

Settler v. Lemeer, 507 F.2d 231 (9th Cir. 1974) 12,13

Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969) 10

State v. Gowdy, 1 Or. App. 424, 462 P.2d 461 (1969), *reh. denied* (1970) 6,13

State v. Settler, 302 Or. 461, 730 P.2d 1252 (1986) 1,7

State v. Settler, 81 Or. App. 518, 726 P.2d 410 (1986) 1,6,7

United States v. Jim, 409 U.S. 80 (1972) 11

United States v. Michigan, 12 Ind. L. Rptr. 3079 (W.D. Mich. 1985) 15

United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *modified*, 623 F.2d 448 (6th Cir. 1980), *as modified*, 520 F. Supp. 207 (W.D. Mich. 1981), *continued as modified*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981) 15

United States v. Oregon, 657 F.2d 1009 (9th Cir. 1982) 10

United States v. Oregon, 718 F.2d 299 (9th Cir. 1983) 10

United States v. Oregon, 769 F.2d 1410 (9th Cir. 1985) 10

United States v. Washington, 384 F. Supp. 312, *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, *reh. denied*, 424 U.S. 978 (1976) 15

TABLE OF AUTHORITIES—Continued

Page

Cases Cited—Continued

United States v. Washington, 459 F. Supp. 1020 (W.D. Wa. 1978) 15

United States v. Washington, 626 F. Supp. 1405 (W.D. Wa. 1985) 15

United States v. Wheeler, 435 U.S. 313 (1978) 13

Washington Game Dep't v. Puyallup Tribe, 414 U.S. 44 (1973) 9

Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962) 12

Williams v. Lee, 358 U.S. 217 (1959) 13

Statutory and Administrative Provisions

12 Stat. 951 (1855) 1

25 U.S.C. § 2 (1982) 12

28 U.S.C. § 1257(3) (1982) 1

Or. Admin. R. 635-41-065 (1983) 3

Or. Admin. R. 635-41-075(1)(a) (1983) 3

Or. Rev. Stat. § 506.045 (1985) 2

Or. Rev. Stat. § 506.129 (1985) 2

Or. Rev. Stat. § 506.991 (1985) 3

Or. Rev. Stat. § 509.011 (1985) 2

Or. Rev. Stat. § 509.011(2)(a) (1985) 4

Yakima Tribal Ordinance, T-90-66 (1966) 3,10

Other Authorities

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982) 12

Fish & Wildlife/Law & Order Committee Action, Yakima Tribe (August 29, 1983) 4

TABLE OF AUTHORITIES—Continued

Page

Other Authorities—Continued

Fish & Wildlife/Law & Order Committee Action, Yakima Tribe (March 16, 1983) 4

Sup. Ct. R. 20 1

Sup. Ct. R. 28 1

Sup. Ct. R. 29 1

69 Interior Dec. 68 (1962) 12-13

PETITION FOR CERTIORARI

The State of Oregon respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on October 8, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing respondents' convictions is reported as *State v. Settler*, 81 Or. App. 518, 726 P.2d 410 (1986), and is attached to this petition as Appendix A. The order of the Supreme Court of the State of Oregon denying the State's petition for discretionary review of the court of appeals' decision is reported at 302 Or. 461, 730 P.2d 1252 (1986), and a copy of the order is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals of the State of Oregon was entered on October 8, 1986. The Supreme Court of Oregon denied a timely petition for discretionary review on December 30, 1986. This petition for certiorari was timely filed within 60 days of that date, pursuant to Sup. Ct. R. 20, as time is computed under Sup. Ct. R. 28 and 29. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).

TREATIES, STATUTES AND REGULATIONS INVOLVED

1. Article 3 of the Treaty with the Yakimas of June 9, 1855, 12 Stat. 951 (1855), provides in part:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured *to said confederated tribes and bands of Indians*, as also the right of taking fish at all usual and accustomed places, *in common with citizens of the Territory* and of erecting temporary buildings for curing them; . . . .

12 Stat. at 953 (emphasis added). The reference to "said confederated tribes and bands of Indians" is to the tribes

named in the preamble of the treaty which, the preamble recites "for the purposes of this treaty, are to be considered as one nation, under the name of 'Yakama' . . . ." 12 Stat. at 951.

2. Oregon Revised Statutes [Or. Rev. Stat.] § 506.129 (1985) authorizes the Fish and Wildlife Commission of the State of Oregon to promulgate rules establishing fishing seasons, as follows:

> (1) After investigation of the supply and condition of food fish, the commission, at appropriate times each year, shall by rule:
>
> (a) Prescribe the times, places and manner in which food fish may be taken or sold, . . . and the amount of those food fish species that may be taken or sold.
>
> (b) Prescribe such other restrictions or procedures regarding the taking, selling or possessing of food fish as the commission determines will carry out the provisions of the commercial fishing laws.

3. Or. Rev. Stat. § 506.045 (1985) excludes treaty-protected fishing activity from the operation of state fishing laws and regulations, as follows:

> There are excluded from the operation of ORS 506.129, . . . any Warm Springs, Umatilla, Yakima, Wasco, Tenino, Wyum and other Columbia River Indians affiliated with these tribes and entitled to enjoy fishing rights, who have not severed their tribal relations, in so far as it would conflict with any rights or privileges granted to such Indians under the terms of the treaties made by the United States with the Warm Springs Indians on June 25, 1855, and with the Umatilla and Yakima Indians on June 9, 1855.

4. The statutory basis for this criminal prosecution is Or. Rev. Stat. § 509.011 (1985), which provides:

> (2) It is unlawful to:
>
> (a) Buy, receive, possess or sell food fish unlawfully caught during a closed season.

Or. Rev. Stat. § 506.991 (1985) provides:

> (3) Violation of any provision of ORS 509.011 which occurs more than 12 hours prior to or more than 12 hours subsequent to a season established under ORS 506.129 by the commission for the lawful taking of food fish when the total value of the food fish is $200 or more is a Class C felony.

5. Oregon Administrative Rules [Or. Admin. R.] 635-41-065 and 635-41-075(1)(a) (1983) established the 1983 commercial winter and fall fishing seasons for the Columbia River Treaty Indian Fishery as follows:

> Salmon and steelhead may be taken for commercial purposes from the Columbia River Treaty Fishery between 12 Noon, February 1 and 12 Noon, March 21, 1983.

Or. Admin. R. 635-41-065 (1983) (Ex. 1 at 7).

> (1) Salmon and steelhead may be taken for commercial purposes:
>
> (a) In the area between Bonneville Dam and McNary Dam from noon August 31 through noon September 2, 1983.

Or. Admin. R. 635-41-075(1) (1983) (Ex. 1 at 7).

6. Regulations of the Yakima Tribe for the Yakima Indian Fisheries Columbia River area are authorized by tribal ordinance, T-90-66:

> BE IT ENACTED by the Yakima Tribal Council of the Yakima Indian Tribe that *the following regulations are deemed to be necessary to promote the conservation of fishery resources* reserved to the use of the Tribe or its members by the Treaty of June 9, 1855 (12 Stat. 951).
>
> GILL NET FISHING in the Columbia River area by members of the Yakima Indian Tribe, pursuant to the rights reserved by the Treaty of 1855, shall be in accord with this ordinance and any regulations issued pursuant hereto. Nothing in this ordinance or in any such regulations shall diminish thr [*sic*] rights reserved to the Tribe and its members by said Treaty or deprive

> the Tribal Council of the right to modify, amend or repeal this ordinance or such regulations, ...

(Ex. 1 at 14, emphasis added).

By Yakima Tribal Fish and Wildlife Law and Order Committee Action dated March 16, 1983, the tribe authorized the following 1983 commercial winter fishing season:

> To extend the Columbia River Closure to Friday, March 18, 1983 at noon.

(Ex. 1 at 22).

The fall Yakima fishery resumed by Action of the Yakima Tribal Fish and Wildlife Committee dated August 29, 1983:

> Pursuant to T-90-66 and T-53-83, YIN fishermen are authorized to sell Klickitat River fish during commercial season on the Columbia River. To maintain an orderly fishery on the Klickitat River, the FRMP staff recommends the following amended season: (WED) NOON, August 31 to (SUN) NOON Sept. 4 . . . .

(Ex. 1 at 24).

STATEMENT OF THE CASE

I. Facts.

Respondents Mary Settler, Carl Settler and Randy Alvin Settler are enrolled members of the Yakima Indian Nation. As a result of an undercover operation to discover and prosecute illegal fish sellers and buyers at the wholesale level, respondents were arrested in June, 1983, when they brought a large quantity of fresh fish into downtown Portland, Oregon, and sold the fish to undercover police officers. At the time of their arrest, no commercial fishing was authorized under either state or tribal fishing regulations. Respondents were indicted for violating Or. Rev. Stat. § 509.011(2)(a) by receiving, possessing and selling food fish unlawfully caught during a closed season.

Respondents and the State of Oregon stipulated to the following facts:

> 1. Defendants, on or about June 30, 1983, at the Cosmopolitan Hotel, 1030 N.E. Union, Portland,

Oregon, County of Multnomah, State of Oregon, did *knowingly* possess or sell food fish, the value of which being more than two hundred dollars. [Emp. supplied].

2. Defendants are enrolled members of the Yakima Indian Nation.

3. The Treaty of 1855 between the Yakima Indian Nation and the United States (12 Stat. 951) as cited in ORS 506.045 is applicable.

4. The Yakima Indian Nation has validly promulgated tribal regulations pursuant to this treaty.

5. The validly promulgated tribal regulations relied upon by the State of Oregon are attached hereto as Exhibit "A."

6. The State elects to present no evidence of conservation necessity and instead relies upon *State v. Gowdy*, 1 Or App 424, 462 P2d 461 (1970) and the tribal regulations attached hereto.

7. Attached are the State of Oregon's regulations OAR 635-41-005 *et seq* promulgated pursuant to ORS 506.129.

8. One spring chinook salmon from the June 30, 1985 seizure at the Cosmopolitan Hotel had snout tag #63-17-33 identifying it as having been released in March 1979 in the Columbia River from the Ringold Hatchery in Washington State.

(C.R. at 171-72).[1] Following a trial to the court based on these stipulated facts, respondents were convicted of receiving, possessing and selling food fish out of season.

II. Raising and Preserving Federal Question.

1. Prior to trial, respondents filed a motion for discovery of the information relied upon by the State of Oregon to

---

[1] References to the court record (C.R.) are from the file of *State v. Mary Settler*, trial court no. 83-07-33299. Substantially identical documents were filed in the companion cases of *State v. Carl Settler*, trial court no. 83-07-33298, and *State v. Randy Alvin Settler*, trial court no. 83-07-33295, which were consolidated on appeal with the *Mary Settler* case.

support its closure of the 1983 fishing season. (C.R. 16). They asserted that the state has a burden to prove that any restriction of their treaty right to fish is reasonable and necessary for conservation purposes. (C.R. 30). The State of Oregon opposed the motion on two grounds. First, while the state agreed that its fishing regulations must satisfy the conservation standard, it asserted that a state criminal court is not the proper forum to litigate the propriety of the regulations. (C.R. 42). Second, the state contended that it was unnecessary to comply with respondents' discovery request because respondents were not entitled to assert a treaty defense (which would give rise to a requirement to prove conservation necessity) where they had acted outside of tribal fishing regulations delineating the scope of their treaty rights. In support of this second argument, the state cited and relied on *State v. Gowdy*, 1 Or. App. 424, 427, 462 P.2d 461 (1969), *reh. denied*(1970). (C.R. 70-73). Respondents filed a memorandum urging the court not to follow *State v. Gowdy*. (C.R. 123-32). On July 3, 1984, the trial court ruled:

> I think before we even get started on that I'm going to make final determination that I am going to follow the case of *State v. Gowdy*, 1 Or. App. 424, in this case; following the rule in that case which would allow the State to proceed without proving the conservation issue if the State can prove that the season was closed by indian [*sic*] regulation at this time, ...

(Tr. 7/3/84 at 3).

2. On appeal to the Oregon Court of Appeals, respondents assigned as error the trial court's adherence to *State v. Gowdy*, as follows:

> The State failed to prove a conservation necessity and failed to prove that the defendants were acting in violation of tribal regulations.

(App. Br. 6, *State v. Settler*, 81 Or. App. 518, 726 P.2d 410 (1986)). The Oregon Court of Appeals reversed respondents'

convictions on the ground that "the state did not prove a conservation necessity in this case." *Id.* at 520.

3. The state thereafter petitioned the Oregon Supreme Court for discretionary review, urging that:

> [t]he Court of Appeals erred in holding that, in this state prosecution of Yakima Indians who sold food fish commercially during a season closed to commercial fishing under both state and tribal fishing regulations, "[i]t does not matter whether the Indians' actions were legal under tribal law; the treaty rights foreclosed the state from acting." *Settler*, *supra*, 81 Or App at 520. Their holding is based on the erroneous assumption that *in all cases* "the state may not convict a treaty Indian of taking fish out of season . . . on ceded land without proving a conservation necessity for imposing the state's laws in an area which is subject to tribal control." *Id.*

(Pet. for Rev. 1-2, *State v. Settler*, 302 Or. 461, 730 P.2d 1252 (1986) (emphasis in original)). Review was denied. *Id.*

REASONS FOR ALLOWANCE OF WRIT

The Oregon Court of Appeals has decided an important federal question which has not been, but should be, settled by this Court. It has held in this case that the state, in prosecuting off-reservation fishing proscribed both by tribal regulations and state law, must prove that the state limitations on the fishing season are justified by a conservation necessity. This conclusion is legally unsupportable and unsound as a matter of policy.

Conservation necessity is a proof requirement announced by this Court in circumstances where there has been state/tribal conflict over the nature or extent of a tribal fishing right and the state's authority to restrict that right. In this instance, as a result of federal court decision and negotiated compacts approved and supervised by the court, the state and the tribes are in agreement, not conflict. After years of state/tribal disputes over the scope of treaty fishing rights,

Oregon, several Western states, several tribes and the federal government are now under continuing federal district court supervision to ensure uniform regulation of fisheries that are protected by treaty rights. The tribes actively participate in this cooperative process. As a consequence of this process, the state and tribal regulation of fishing rights are substantially identical.

When, as here, a tribe regulates off-reservation fishing, those regulations as a matter of law delineate the scope of the treaty right. This is particularly true when, as here, the tribal regulations expressly state that they were adopted for conservation purposes. If an individual tribal member violates the tribe's regulations, he or she necessarily acts beyond the scope of the treaty right. Therefore, if the state prosecutes that individual under the parallel restrictions of state law, the tribal member has no treaty defense to assert and the state's obligation to prove conservation necessity never arises.

The Oregon court's conclusion to the contrary is legally wrong. As important, it is a bad result. Practically, given the resource limitations at the local prosecution level, many violations of state regulations will not be pursued if the state must routinely prove conservation necessity to establish a *prima facie* case. Nonenforcement or limited enforcement of Oregon's regulations threatens depletion of a shared natural resource and is, therefore, destructive to the interests of all participants in the federal court's management plan. Moreover, the cooperative efforts of many parties are frustrated and nullified, because individual tribal members remain free to assert treaty defenses in the face of the tribe's contrary delineation of the treaty rights.

I. The state/tribal conflict which in prior cases prompted this Court to require states to prove conservation necessity does not exist here.

In *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392 (1968) (*Puyallup I*), this Court declared:

> The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

Id. at 398 (citation omitted). The "appropriate standards" requirement means that the state must demonstrate that its regulation is a "reasonable and necessary conservation measure," *Washington Game Dep't v. Puyallup Tribe*, 414 U.S. 44, 45 (1973) (*Puyallup II*), and that its application to the Indians is necessary in the interest of conservation. *Antoine v. Washington*, 420 U.S. 194, 207 (1975).

The factual predicate for the *Puyallup* line of cases was a confrontation between state laws prohibiting all off-reservation net fishing for certain species of fish and tribal assertion of treaty rights to fish with the state-prohibited gear. *Puyallup I*, 391 U.S. at 395-96; *Puyallup II*, 414 U.S. at 48-49. Similarly, in *Antoine* the state and tribe disagreed about the extent of the treaty right to hunt. *Antoine*, 420 U.S. at 207. In all of those cases, state restrictions on fishing and hunting operated to favor non-Indian sportsmen and to undermine Indian subsistence and commercial harvesting. *Puyallup I*, 391 U.S. at 396. This Court adopted the standard that state regulations limiting a treaty fishing or hunting right must be a reasonable and necessary, nondiscriminatory, conservation measure in order to strike a balance between the treaty-guaranteed subsistence rights of tribal members and the state's police power to conserve wildlife resources.

The kind of state/tribal conflict present in the *Puyallup* cases and *Antoine* does not exist in this case. Shortly after the *Puyallup I* decision, several Yakima tribal members joined

with the United States government and the Columbia River tribes to sue the State of Oregon in federal district court. They sought a decree defining their treaty right "of taking fish at all usual and accustomed places" on the Columbia River and settling the manner and extent of the State of Oregon's authority to regulate Indian fishing. That suit resulted in entry of the decision in *United States v. Oregon sub nom Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969), which began the district court's ongoing supervision of the Columbia River fishery by retaining continuing jurisdiction over state regulation of treaty rights. As part of its continuing jurisdiction, the district court in 1977, with the consent of all the parties including the tribes, adopted a management plan establishing a formal mechanism for the states of Washington and Oregon to promulgate state regulations consistent with treaty rights. *See United States v. Oregon*, 769 F.2d 1410, 1413 (9th Cir. 1985); *United States v. Oregon*, 718 F.2d 299, 303 (9th Cir. 1983); *United States v. Oregon*, 657 F.2d 1009, 1016 (9th Cir. 1982). Now, because of the tribes' active participation in that process, more often than not state regulations are adopted with the concurrence of the affected tribes. The tribes' concurrence is most clearly reflected, as in this case, by their adoption of regulations that mirror the states' regulations, including the express declaration in those regulations that they "are deemed to be necessary to promote the conservation of fishery resources." Yakima Tribal Ordinance, T-90-66 (1966).

In the *Puyallup* line of cases that prompted the requirement of proof of conservation necessity, where state and tribal regulations were in conflict, it made sense to require proof of conservation necessity before the state could exercise regulatory authority over a tribal member acting in conformance with tribal authority. That same requirement does not make sense here, where both state and tribal regulations concur to

close a treaty fishery and stipulate the very conservation necessity that might otherwise be at issue. The fundamental issue unresolved by this Court is the effect on tribal members of tribal regulation of a treaty resource. If tribal regulation of a tribal treaty right is binding on tribal members' exercise of the treaty right, then where tribal and state regulations concur to limit certain conduct, a tribal member should not be able to assert a treaty-based defense to state criminal prosecution. Absent a treaty-based defense, proof of conservation necessity is unnecessary in the state criminal proceeding. This Court's earlier holdings requiring proof of conservation necessity should, therefore, be reexamined or refined in the context of the circumstances presented in this case.

II. Tribal members who fish in violation of tribal regulations that delineate or allocate the tribe's treaty fishing right act outside of their treaty rights and are subject to prosecution under state law like other citizens.

It is well settled that treaty rights are vested in the tribe, and that the tribe allocates the use of those rights among its members. In *dicta*, this Court has recognized that treaty fishing rights are vested in the tribe and that it is the tribe's task to allocate its share of the treaty resource among tribal members. *Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165, 178 (1977) (*Puyallup III*).

Because treaty rights vest in the tribe as a whole, tribal interests in real and personal property are communally held and an individual tribal member has no alienable or inheritable interest in the communal holding absent a federal law or treaty granting vested rights to individual members. *See, e.g., N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *United States v. Jim*, 409 U.S. 80, 82 (1972).[2] Accordingly, the

---

[2] *See also Sac & Fox Indians (Iowa) v. Sac & Fox Indians (Oklahoma)*, 220 U.S. 481, 483-84 (1911); *Delaware Indians v. Cherokee Nation*, 193 U.S. 127, 136 (1904).

manner in which a tribe chooses to use its property can be controlled by individual members only to the extent that they participate in the governmental processes of the tribe. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 472, 605-07 (1982). *Cf. Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962) (the use of accustomed fishing places is a tribal right subject to adjustment by the tribe); *Settler v. Lemeer*, 507 F.2d 231 (9th Cir. 1974) (Yakima Tribe has authority to enforce tribal members' violations of tribal fishing regulations because the fishing rights reserved in the Treaty of 1855 are communal rights of the tribe).

Thus, the tribe's regulation of its treaty right is clearly binding on tribal members for purposes of tribal enforcement. By the same rationale, the tribe's delineation of its treaty right as promulgated in a tribal fishing regulation should be binding on its members when those members attempt to assert their treaty rights against others, like the states.

This proposition is consistent with the conclusion of the United States Department of Interior, the agency charged by federal law with the "management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2 (1982). Historically, that agency has taken the position that tribal regulation of the treaty right is binding on tribal members even in state criminal prosecutions. Memorandum Opinion No. M-36638, May 16, 1962, of the Solicitor of the United States Department of Interior, states:

> In our opinion it is clear from the foregoing that a tribe may define and regulate its treaty fishing rights. Furthermore, in so doing the tribal group may adopt ordinances to preserve and protect such fishing rights, since the tribe is not bound to set idly by while individual members commit acts amounting to confiscation or destruction of the tribe's treaty rights. By

> prescribing the manner in which the off-reservation treaty fishing right is to be exercised by its members, a tribe may afford the basis for State prosecution of Indians who fish contrary to State law in a manner which the tribe has declared to be outside the scope of the treaty right. *An Indian who is fishing outside an Indian reservation at a time or in a manner contrary to the provisions of a tribal ordinance would not be exercising the treaty right, and in this circumstance would not have such right available as a defense to a State prosecution for violation of State conservation laws.*

69 Interior Dec. 68, 70 (1962) (emphasis added).[3]

The conclusion that tribal regulations bind tribal members in a state prosecution is consistent with recognized principles of tribal sovereignty. Although, as this Court has noted, tribal sovereignty is limited in its nature, *United States v. Wheeler*, 435 U.S. 313, 323 (1978), tribal regulation of "internal affairs" is one aspect of retained tribal sovereignty. *Williams v. Lee*, 358 U.S. 217, 221-22 (1959). When and how treaty fishing rights may be exercised by tribal members is, as the Ninth Circuit has held, an "internal affair" of the tribe. *Settler v. Lameer*, 507 F.2d at 237.

The tribe's delineation and allocation of its treaty rights should be binding on its members who are prosecuted in state

---

[3] The brief of the United States, *Amicus Curiae*, filed in support of the State of Oregon in the case of *State v. Gowdy, supra*, reiterated the United States' position that tribal regulation of treaty rights are binding on tribal members in state criminal proceedings and cogently identified some of the very difficult, if not impossible, inquiries that courts would have to make if treaty rights were vested in individual tribal members.

> The nearly unsuperable problems which would arise if the treaty rights were regarded as individual, rather than tribal, should settle the issue. Thus, the individuals exercising the fishing rights would have to trace the right through descent or its equivalent in Indian law (there is none that we know of in this area) back to 1855 and possibly show the extent of its exercise over that long period of years. Also, the question of alienability of the right would be injected. These and other possible ramifications negate the rights being other than tribal.

(Amicus brief at 6, *State v. Gowdy, supra*).

court. No other result is coherent policy. Either the tribe has authority to define the tribal members' exercise of a treaty right or it does not. If the tribe has the authority to bind its members, individuals who exceed tribal limits should not be entitled to assert a "treaty" defense to state prosecution under parallel regulations. Accordingly, proof of conservation necessity should not be required.

III. The issue presented needs definitive resolution by this Court.

It is imperative for this Court to settle the questions whether treaty rights belong to the tribe and whether tribal members have any treaty-secured immunity from the application of state fishing laws and regulations when identical tribal limitations restrict their treaty rights. Without a reversal of the Oregon Court of Appeals' decision, state enforcement of this shared treaty resource will be distressingly impaired. In practical terms, the burden to prove conservation necessity significantly limits the state's ability to prosecute fishing law violations. Inquiries into "conservation necessity" frequently require the production of one or several experts with an extensive background in the Columbia River fishery. In many instances, local prosecutors' offices simply do not have the staff or resources to present proofs on this intricate and specialized area. The Oregon Court of Appeals' decision thus overtly invites individual tribal members to assert individual "treaty" rights as a defense to prosecution in state court even though they act outside the scope of their treaty rights as defined by their tribe.

Protection of the Columbia River fishery is undermined in a second, more disturbing way. The state has a legitimate interest in the relationship between the tribe and its members because of its interest in the protection of a shared treaty resource. *See Puyallup III*, 433 U.S. at 178. If a tribe does not have the authority to bind its members to its regulation of the

treaty right, the effectiveness of negotiations between the states and tribes to manage the shared treaty resource will be seriously, perhaps fatally, undercut. Tribal agreements with the states to limit the use of the treaty resource, reflected in the parallel state and tribal regulations of use of that resource, will be merely precatory. That fact, of course, increases the incentive for individuals like respondents to ignore state and tribal regulations, thus threatening the destruction of the treaty resource. The many tribal nations and the several Western states which cooperatively have worked towards conservationally sound management of the Columbia River fishery share an interest in avoiding that result.

The significance of the issue far transcends this particular case. In the Columbia River treaty fishery alone, the outcome of this case will affect the interests of the States of Oregon, Washington and Idaho, the United States, and the confederated tribes of Yakima, Warm Springs, Umatilla and Nez Perce Indians. In *United States v. Washington*, 384 F. Supp. 312, *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, *reh. denied*, 424 U.S. 978 (1976), the State of Washington, the United States and as many as 24 tribes are managing the western Washington treaty fishery under the continuing jurisdiction of the federal district court. *See United States v. Washington*, 626 F. Supp. 1405 (W.D. Wa. 1985); *United States v. Washington*, 459 F. Supp. 1020 (W.D. Wa. 1978). The regulation of the Great Lakes treaty fishery is also subject to federal court supervision between the State of Michigan and several tribes. *United States v. Michigan*, 12 Ind. L. Rptr. 3079, 3089-93 (W.D. Mich. 1985); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *modified*, 623 F.2d 448 (6th Cir. 1980), *as modified*, 520 F. Supp. 207, 211 (W.D. Mich. 1981), *continued as modified*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981).

Similarly, the State of Oregon is aware of informal negotiations between various states and tribes to coordinate nonjudicial regulation of shared treaty resources. Voluntary coordination should be encouraged for sound policy reasons. Coordination and cooperation between states and tribes, however, can only be effective if premised on tribal authority to bind its members to the joint regulations.

CONCLUSION

The question of whether and to what extent a tribal member is entitled to assert a "treaty" defense in a state enforcement proceeding based on conduct that contravenes the tribe's limitations on the exercise of treaty rights is a substantial federal question that has not been but should be addressed by this Court. Resolution of the question significantly affects the delicate balance between state and tribal efforts to manage and regulate scarce, shared treaty resources. For the reasons advanced above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Oregon.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
MICHAEL D. REYNOLDS
Assistant Solicitor General
LINDA DeVRIES GRIMMS
Assistant Attorney General
Counsel for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent,
v.
MARY SETTLER,
Appellant.
(83-07-33299); CA A35093 (Control)
STATE OF OREGON,
Respondent,
v.
CARL SETTLER,
Appellant.
(83-07-33298; CA A35094)
STATE OF OREGON,
Respondent,
v.
RANDY ALVIN SETTLER,
Appellant.
(83-07-33295; CA A35095)
(Cases Consolidated)

Appeal from Circuit Court, Multnomah County.

Robert W. Redding, Judge.

Argued and submitted May 19, 1986.

Lawrence Matasar, Portland, argued the cause for appellants. With him on the brief was Hoffman, Matasar & Glaeser, Portland.

Linda DeVries Grimms, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

PER CURIAM
Reversed.
Young, J., dissenting.

PER CURIAM

Defendants are Yakima Indians. They appeal from judgments convicting them of receiving, possessing and selling food fish out of season. ORS 509.011(2)(a); 506.911(3). They assign error to the trial court's denial of their motion for judgments of acquittal. We reverse.

Defendants' primary argument is that the state may not enforce its fishing laws against treaty Indians without alleging and proving a conservation necessity for doing so. We have recently held that the state may not convict a treaty Indian of taking fish out of season or of selling a game animal on ceded land without proving a conservation necessity for imposing the state's laws in an area which is subject to tribal control. It does not matter whether the Indians' actions were legal under tribal law; the treaty rights foreclosed the state from acting. *State v. Jim (Bruce)*, 81 Or App 189, ___ P2d ___ (1986); *State v. Jim (Warner)*, 81 Or App 177, ___ P2d ___ (1986). The state did not prove a conservation necessity in this case. The court should have granted the motions for acquittal.

Reversed.

YOUNG, J., dissenting.

I dissent, because I am generally in agreement with the concurrence of Rossman, J., in *State v. Jim (Warner)*, 81 Or App 177, ___ P2d ___ (1986).

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON, Petitioner	)	
v.	)	ORDER DENYING REVIEW
SETTLER, MARY SETTLER, CARL SETTLER, RANDY ALVIN Respondents	)	CA A35093 SC S33412

The Court has considered the petition for review and ORDERS that it be denied.

DATE: DECEMBER 30, 1986.

/s/ EDWIN J. PETERSON
EDWIN J. PETERSON
CHIEF JUSTICE

[copy distribution omitted in printing]

GILLETTE, J., NOT PARTICIPATING

Supreme Court, U.S.
FILED
MAY 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1414

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF OREGON,

Petitioner,

v.

MARY SETTLER,
CARL SETTLER, and
RANDY ALVIN SETTLER,

Respondents.

On Petition for Writ of Certiorari
to the Court of Appeals
of the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

LAWRENCE MATASAR
Hoffman, Matasar & Glaeser
1020 S.W. Taylor, Suite 330
Portland, Oregon 97205
Phone: (503) 222-9830
Counsel for Petitioners

QUESTION PRESENTED

May a state obtain a felony conviction for violation of state fishing laws against a member of an Indian tribe with tribal fishing rights without proving a conservation necessity at trial?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents iii

Table of Authorities v

Statement of the Case 1

Facts 1

Reasons Why the Petition Should be Denied 1

I. A. The state/tribal conflict, which was a significant reason for the treaties between the federal government and the tribes, continues to exist between the State of Oregon and the Yakima Nation 4

B. The Conservation Requirement is based on judicial construction of the 1855 treaty itself and the intentions of the parties at the time it was signed. It is therefore not subject to revision when the state/tribal conflict is temporarily in abatement 9

C. The State of Oregon is incorrect in asserting that adoption of its argument would make it easier for state authorities to prosecute fishing violations against Indians with tribal fishing rights 11

II. The conservation requirement exists in state criminal courts independently of any determination of whether a treaty Indian is fishing in violation of tribal regulations 12

A. A tribe's authority to regulate the treaty fishing rights of its members does not create a state court power to convict treaty Indians without the proof of conservation necessity, even if the state court were to find that an Indian was fishing in violation of tribal regulations 12

B. Treaty Rights Protect Individual Tribal Members ... 13

C. State Courts are Not Appropriate Interpreters of Indian Tribal Regulations 14

III. This case presents an inappropriate factual record to address the issues raised in the petition 16

A. There was no proof at trial that these defendants violated any tribal regulations 16

B. There was insufficient evidence presented at trial that the fish sold by the defendants were taken from the Columbia River 16

Conclusion 17

TABLE OF AUTHORITIES

Page

Cases Cited

Antoine v. Washington, 420 U.S. 194 (1975) 2, 6, 11

McCalanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) 14

Puget Sound Gill Netters Ass'n v. United States District Court, 573 F.2d 1123 (9th Cir. 1978), *affirmed* 443 U.S. 658 (1979) 1, 8, 15

Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968) *(Puyallup I)* 2, 6, 10

Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974) 12, 13

State v. Gowdy, 1 Or. App. 424, 462 P.2d 461 (1969), *reh. denied* (1970) 12, 15

Tulee v. Washington, 311 U.S. 681 (1942) 2, 6, 10

United States v. Oregon, 769 F.2d 1410 (9th Cir. 1985) 9

United States v. Washington, 384 F.Supp. 312, *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert denied,* 423 U.S. 1086, *reh denied,* 424 U.S. 978 (1976) 7, 13, 15

United States v. Winans, 198 U.S. 371 (1905) 14

Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979) 7

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 5, 8

Washington Game Dep't v. Puyallup Tribe, 414 U.S. 44 (1973) 6

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 5

Statutory and Administrative Provisions

12 Stat. 951 (1855) 1, 6
36 Op Ore. Att'y Gen. 531 (1973) 5
Or. Rev. Stat § 509.011 16
U.S. Const. art. I, § 8, cl. 3 ..... 1, 4

Other Authorities

Professor Charles Wilkinson, *American Indian, Time and the Law* (1987) 1, 4

J. Madison, *Journal of the Federal Convention* (E. Scott ed. 1898) 4

Wilkinson & Conner, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource*, 32 U. Kan. L. Rev. 17 (1983) 7

STATEMENT OF THE CASE

Facts

Petitioner has accurately stated the stipulated facts under which this case was tried (pp. 4-5). However, as it has throughout this case, petitioner failed to cite tribal regulations that prohibited the specific acts committed by respondents: selling or possessing food fish out of season rather than the act of fishing itself.

REASONS WHY THE PETITION SHOULD BE DENIED

Even before the Constitution was adopted, Native American Indians were particularly wary of expanding state powers. The Framers of the Constitution intended that the federal government, not the states, would regulate Indian matters. U.S. Const. art. I, § 8, cl. 3. When treaties were signed between the federal government and the Pacific Northwest Indian tribes, it was intended that the tribes' commercial fishing rights would be protected against state interference by the "Great Father" in Washington. Wilkinson, *American Indians, Time and the Law* (1987).

In the years following the Treaty with the Yakimas, 12 Stat. 951 (1855), actions by the states resulted in substantially reduced Indian fishing. There has been frequent litigation in this area. In countless cases, continuing up to the present, the federal government assisted the Indians in asserting their treaty rights against the states of Oregon and Washington, *infra.* On several occasions, the states openly resisted federal court orders. *See e.g., Puget Sound Gill Netters Ass'n v. United States District Court,* 573 F.2d 1123, 1126 (9th Cir. 1978), *affirmed* 443 U.S. 658 (1979).

In 1942, this Court construed the Yakima Treaty as requiring that, before a state can obtain a conviction in state court against a treaty Indian for unlawful fishing at a site

covered by the treaty, the state must show that its regulations "are necessary for the conservation of fish." *Tulee v. Washington*, 311 U.S. 681, 684 (1942). Subsequently, similar language in other treaties has been interpreted to require proof of a conservation necessity before a state can enforce its regulations against treaty Indians. *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392 (1968) *(Puyallup I)* (interpreting the Treaty of Medicine Creek) and *Antoine v. Washington*, 420 U.S. 194 (1975) (interpreting treaty-like Congressional legislation). This principle has become known as the conservation requirement.

There is no support for petitioner's legal argument that a temporary abatement of what petitioner calls "the state/tribal conflict" eliminates the conservation requirement, even if a state court finds that an Indian was fishing in violation of tribal regulations. Moreover, if there were legal support for such an argument, it would be inapplicable to the instant case because the state/tribal conflict between the State of Oregon and the Yakima Nation remains very serious to the present day. And more importantly, petitioner has never shown that respondents, who were charged in state court with possession and sale of food fish out of season, have actually violated any Yakima tribal regulations, which only prohibit the act of fishing out of season.

Accordingly, the writ should be denied.

I.

A. The state/tribal conflict, which was a significant reason for the treaties between the federal government and the tribes, continues to exist between the State of Oregon and the Yakima Nation.

B. The Conservation Requirement is based on judicial construction of the 1855 treaty itself and the intentions of the parties at the time it was signed. It is

therefore not subject to revision when the state/tribal conflict is temporarily in abatement.

C. The State of Oregon is incorrect in asserting that adoption of its argument would make it easier for state authorities to prosecute fishing violations against Indians with tribal fishing rights.

INTRODUCTION

The State of Oregon, in its Petition for Writ of Certiorari, asserts that the "conservation requirement" — the mandate from this Court that a state must prove a conservation necessity before enforcing its fishing regulations against treaty Indians — is a flexible, court created doctrine based on the continuing historical conflict between this nation's Indian tribes and the states. Petitioner then maintains (pp. 8-11) that such conflict no longer exists between it and the Yakima Indian Nation. Petitioner concludes that when the "state/tribal conflict" does not exist, and when a State criminal court finds that an Indian is fishing in violation of tribal regulations, the state can enforce its fish and game laws against the treaty Indian without the need to show conservation necessity. Furthermore, petitioner asserts that adoption of its position would ease the burden on the local authorities that prosecute Indians for fishing violations.

This argument fails on each of its central premises. First, it fails on the facts: there has not been a significant reduction in the prolonged conflict between the State of Oregon and the Yakima Indian Nation. Second, it fails on the law: a temporary relaxation in tensions between one state and a particular tribe is irrelevant to the conservation requirement, which is based on judicial construction of the Indian treaties themselves. And third, it fails in its assumption (pp. 8, 14) that it would result in significant savings of resources at the local prosecution level.

A. The state/tribal conflict, which was a significant reason for the treaties between the federal government and the tribes, continues to exist between the State of Oregon and the Yakima Nation.

(1). Historical Background

In the first heading of the Petition for Certiorari, under the section **REASONS FOR ALLOWANCE OF WRIT,** petitioner states: "The state/tribal conflict which in prior cases prompted this Court to require states to prove conservation necessity does not exist here." (p. 8). This statement, the linchpin of the State's argument, is incorrect.

In order to examine the current relationship between the State of Oregon and the Yakima Indian Nation, it is necessary to briefly review what petitioner has called the "state/tribal conflict."

Historically, one of the central reasons that Native American Indian tribes entered into treaties with the federal government was to obtain protection against the emerging powers of the states. Professor Charles Wilkinson, in *American Indians, Time and the Law,* 17 (1987), points out that "whatever the motives and whenever the era, presidents, commissioners, and Indian agents repeatedly reassured treaty tribes that the Great Father in Washington would secure the Indian people in their newly demarcated lands against the rising tide of white civilization."

The primary role of the federal government vis-a-vis the states in Indian affairs was specifically stated in the Constitution: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

James Madison, the principal writer of the Indian Commerce Clause, argued that this provision, by vesting the primary power over Indian affairs in the federal government,

would eliminate problems confronted during the period of the Articles of Confederation, when the states claimed authority over Indian relations and lands. See, e.g., J. Madison, *Journal of the Federal Convention* 190, 549 (E. Scott ed. 1898).

The Constitutionally mandated inferior role of the states with regard to Indian affairs was affirmed early in the jurisprudence of this Court. In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 594 (1832), Chief Justice John Marshall wrote that under the Indian Commerce Clause, the federal government "has the exclusive regulation of intercourse with the Indians; and so long as this power shall be exercised, it cannot be obstructed by the state."

The role of protector of the Indians against state power was specifically assumed by the federal government in treaty negotiations in the mid-Nineteenth Century. The Governor of the Washington Territory, Isaac Stevens, who negotiated the treaties with the Northwest's Indian tribes, explained a similar fishing provision to tribal members gathered at Point-No-Point:

> "Are you not my children, and also children of the Great Father? What will I not do for my children, and what will you not for yours? Would you not die for them. * * * This paper is such as a man would give to his children and I will tell you why * * *. This paper secures your fish. Does not a father give food to his children?"

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667, n. 11 (1979).

In the treaty negotiations, the Northwest tribes were particularly concerned that their commercial fishing rights be protected. The Attorney General of Oregon has stated that "the Indians who fished the Columbia river historically used their catch for barter as well as for subsistence and ceremonial purposes. Presumably, the treaties were entered into with the expectation that the Indians would be permitted to barter or sell what they caught." *36 Op. Ore. Att'y Gen.* 531, 534 (1973).

This Court has recognized the importance that hunting and fishing rights played in the Treaty with the Yakimas, 12 Stat. 951 (1855). In *Tulee v. Washington*, 311 U.S. 681, 684 (1942) the Court discussed the treaty negotiations:

> "From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes."

Tulee held that a state could regulate merely the time and manner of Indian fishing at the "usual and accustomed places", and then only if the regulations were "indispensible to the effectiveness of a state conservation program." 315 U.S at 685. This approach was affirmed in *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392 (1968) *(Puyallup I)*, *Washington Game Dep't v. Puyallup Tribe*, 414 U.S. 44 (1973) *(Puyallup II)*, and *Antoine v. Washington*, 420 U.S. 194 (1975).

Thus, the historical record is clear that the "state/tribal conflict" was a central basis for negotiation of the treaty provision in 1855 guaranteeing the Yakimas "the right of taking fish at all usual and accustomed places." Article 3 of the Treaty with the Yakimas, 12 Stat. 951 (1855).

(2). Recent legal history (1970s and 1980s)

The State argues that the above historical conflict between the tribes and the states no longer applies to its relations with the Yakimas: "In this instance, as a result of federal court decision and negotiated compacts approved and supervised by the court, the state and the tribes are in agreement, not conflict" (p. 7). The State of Washington has filed a Brief as *Amicus Curiae* in support of Oregon's position. Yet, their argument is without foundation: this conflict has extended to the present.

In the years after the signing of the treaty in 1855, the states of Oregon and Washington acted steadily to decrease

the fish taken by members of the Yakima Nation. It was only the intervention of the federal courts, often at the request of the United States government, that allowed the Yakimas to exercise the fishing rights their ancestors intended to preserve when the treaty was signed, *infra.* The landmark fishing rights decision in the Pacific Northwest was *United States v. Washington,* 384 F.Supp. 312, *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert denied,* 423 U.S. 1086, *reh denied,* 424 U.S. 978 (1976). The district court's opinion became known as the *Boldt* decision, named after the District Judge who presided over this protracted litigation.

This decision, which allocated equal portions of the fish runs between Indians and non-Indians, was of such critical importance that it has been measured statistically:

> "In 1971, 1972, and 1973 (the last 3 years before the *Boldt* decision), for example, Indians harvested 5%, 7.5%, and 6.5%, respectively, of all fish taken in Puget Sound. In 1980 and 1981 (the last years for which final figures are available), Indians took 55% and 39%, respectively. The Indian share of fish harvested on the Columbia has also increased substantially."

Wilkinson & Conner, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource,* 32 U. Kan. L. Rev. 17, 98 n.438 (1983).

Contrary to the posture of the State of Oregon in its Petition for Certiorari, and contrary to the position of the State of Washington in its *Amicus* brief in support of Oregon's Petition, both states have vigorously fought against tribal fishing rights whenever and wherever they could. They have fought the tribes, *supra.* They have fought the United States government, which has acted both as trustee for the tribes and on its own behalf in litigation to support Indian fishing rights. *See e.g., Washington v. Fishing Vessel Ass'n.,* 443 U.S. 658, 669 (1979).

The states have even fought the federal courts, thereby suffering stinging judicial criticism. For example, the United States Court of Appeals for the Ninth Circuit noted that "Except for some desegregation cases [citations omitted], the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century." *Puget Sound Gill Netters Ass'n v. United States District Court,* 573 F.2d 1123, 1126 (9th Cir. 1978), *affirmed* 443 U.S. 658 (1979). Oregon United States District Court Judge James Burns, sitting on the Ninth Circuit by designation in *United States v. Washington, supra,* wrote a concurring opinion, stating in part:

> "The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been the recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten."

520 F.2d at 693.

Frequent, intensive federal litigation over Indian fishing rights in the Pacific Northwest has continued in the years after Judge Boldt's decision in *United States v. Washington, supra.* Petitioner correctly states that the tribes and the states are currently involved in a court-ordered plan to jointly manage the Columbia River fishery. However, petitioner is completely wrong in stating that the existence of such a plan has eliminated tribal/state conflict.

The courts' hope that judicially mandated joint regulation of the Columbia River fishery would eliminate tribal/state conflict was a noble one. Yet, it has obviously not yet reached fruition. The numerous, recent, Indian fishing rights cases entitled "United States v. Oregon" listed in Oregon's Petition are in themselves some evidence of the serious, continuing

conflict in this area. As recently as August of 1985, the Ninth Circuit affirmed a district court finding "that the fishery regulations promulgated by the Columbia River compact violated the Indians' tribal fishing rights." *United States v. Oregon*, 769 F.2d 1410, 1412 (9th Cir. 1985) (emphasis added).

Perhaps the clearest statement of the current situation was given by Yakima Nation Tribal Chief Levi George, who testified at a hearing in the instant case. Tr. 12/21/84 at 185-202. Chief George has taken part in fishery negotiations with Oregon and Washington authorities, as well as with officials from the federal government and Canada. He succinctly summarized the tribal members' current view of the state's regulations: "they give us fishing when there's no fishing." Tr. 12/21/84 at 191.

Given this historical record, petitioner is clearly wrong in asserting that the state/tribal conflict no longer exists between the State of Oregon and the Yakima Nation. Since the alleged non-existence of this conflict is one of the petitioner's central reasons for allowance of the writ, the writ should be denied.

B. The Conservation Requirement is based on judicial construction of Indian treaties themselves and the intentions of the parties at the time they were signed. It is therefore not subject to revision when a particular state/tribal conflict is temporarily in abatement.

The second prong of petitioner's first reason for allowance of the writ is its analysis that this Court's decisions on the conservation requirement were based on state/tribal conflicts existing at the time of the prosecutions in those cases. This analysis is incorrect: the conservation requirement is founded on this Court's interpretation of the treaties themselves, based upon the intentions of the parties when the treaties

were signed. Thus, even if the state/tribal conflict between a particular state and a tribe were temporarily in abatement, the state would still be required to prove a conservation necessity before enforcing its criminal fishing laws against treaty Indians.

The "conservation requirement" was first announced by this Court in *Tulee v. Washington,* 311 U.S. 681 (1942). *Tulee* reversed a Washington state court conviction of a Yakima tribal member for catching salmon with a net without first having obtained a state license. Sampson Tulee had unsuccessfully challenged the application of the statute to him in the state trial court and in the Washington Supreme Court on the ground that it was repugnant to the Yakima treaty. 315 U.S. at 682. In arguments to this Court, both the State of Washington and the defendant relied upon their constructions of the treaty. *Id.* The Supreme Court, in a unanimous opinion by Justice Black, based its holding squarely upon the treaty itself:

> "We think the state's *construction of the treaty* is too narrow and the appellant's too broad; that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here."

315 U.S. at 684. Significantly, the *Tulee* Court did not rely upon the factual conditions at the time of its decision, but upon the conditions existing at the time the treaty was signed:

> "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."

315 U.S. at 684-685. *Also see Puyallup Tribe v. Dep't of Game,* 391 U.S. 392 (1968) (*Puyallup I*) (interpreting the Treaty of

Medicine Creek) and *Antoine v. Washington,* 420 U.S. 194 (1975) (interpreting treaty-like Congressional legislation).

Because the conservation requirement is based upon judicial construction of the Treaty with the Yakimas of 1855 and the conditions existing at that time and place, a temporary cessation of the state/tribal conflict in the 1980s, even if such a cessation did exist, cannot support that requirement.

C. The State of Oregon is incorrect in asserting that adoption of its argument would make it easier for state authorities to prosecute treaty Indians for fishing violations.

In its Petition, the State of Oregon asserts (pp. 8, 14) that the conservation requirement is a burden at the local prosecution level. Yet, Petitioner does not support this assertion with citations either to the record or to legal authorities.

But in any event, it is clear that the position urged by petitioner in lieu of the conservation requirement would be equally burdensome to local prosecutors and courts. The determination of the first prong of the petitioner's test (p. 9), whether "the kind of state/tribal conflict present in the *Puyallup* cases and *Antoine*" exists in a particular case, would require a delicate analysis by the state trial court of the current relations between the criminal defendant's tribe and the prosecuting state. Litigation of this delicate concept would likely involve as great an expenditure of local resources to prove favorable state/tribal relations as are now involved in proving conservation necessity.

The second part of petitioner's analysis requires a determination by *the state court* of whether the Indian defendant was fishing in violation of tribal regulations. The interpretation of tribal regulations by state courts is inconsistent with one of the Indians' primary purposes in negotiating the treaties: protection from state powers. Section I (A), *supra.*

Therefore, petitioner's approach is as unworkable as it is legally unsupportable and the writ should be denied.

II.

The conservation requirement exists in state criminal courts independently of any determination of whether a treaty Indian is fishing in violation of tribal regulations.

A. A tribe's authority to regulate the treaty fishing rights of its members does not create a state court power to convict treaty Indians without the proof of conservation necessity, even if the state court were to find that an Indian was fishing in violation of tribal regulations.

Petitioner seeks to deny a significant protection of the treaties, the conservation requirement, to all Indians charged in state court who are found to be fishing in violation of their own tribe's fishing regulations. Throughout this litigation, petitioners have been unable to cite a single decision from any jurisdiction in direct support of this analysis other than *State v. Gowdy,* 1 Or. App. 424, 462 P.2d 461 (1969), *reh. denied* (1970).

Instead of court decisions, the petitioner has cited a 1962 Memorandum Opinion from the Department of Interior and an *amicus* brief filed in 1969 (pp. 12-13). Petitioner's argument is conceptually based on the broad statement that treaty rights are vested in the tribe. Respondents have no quarrel with this as a general proposition of Indian treaty law, which allows the tribes to govern their own members *in tribal courts.* Yet, this general principle cannot be extended to deny treaty protections in state courts even if the state court were to find that an Indian was fishing in violation of tribal regulations.

The leading case on the question of the tribe's power to regulate its own members is *Settler v. Lameer,* 507 F.2d 231

(9th Cir. 1974), which was specifically relied upon by petitioner (pp. 12-13). However, *Settler v. Lameer* is in clear opposition to petitioner's claims that such tribal regulatory authority can be used to deny the conservation defense to treaty Indians in state court.

The *Settler* opinion quoted from *Puyallup I* that:

> "The manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State *in the interests of conservation,* provided the regulation meets appropriate standards and does not discriminate against the Indians."

507 F.2d at 237 (*emphasis in Settler*). Moreover, after clearly emphasizing the state's limited authority to regulate commercial fishing only "in the interests of conservation", *Settler* states that:

> "once the limits of state authority have been reached there remain significant areas of fishing activities *which are not necessarily subject to state regulation.* Among these activities particularly susceptible to the tribe are: (1) the use of accustomed fishing places; *** (4) the time of taking fish ***. Appellees [The Yakima tribal police chief and the Chief Judge of the Yakima Tribal Court] had the authority to arrest and prosecute tribal members for violation of the Tribal fishing regulations."

507 F.2d at 237-8 (emphasis added). Therefore, *Settler* was addressed solely to tribal regulation "once the limits of state authority have been reached." It cannot support petitioner's approach, where tribal regulations are used to greatly expand the longstanding limits of state authority inherent in the conservation requirement.

B. Treaty Rights Protect Individual Tribal Members

When tribal treaty rights and individual treaty rights are in conflict, courts have often protected the individual Indian. Judge Boldt, in *U.S. v. Washington, supra,* plainly stated that

fishing rights are personal rights held and exercised by individual tribe members. 384 F. Supp. at 337. Judge Boldt based this conclusion on the Supreme Court's earlier pronouncement in *U.S. v. Winans,* 198 U.S. 371, 381 (1905):

> "They [the Treaty reservation of fishing rights] reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein."

And more recently, this Court acknowledged that Indian treaties conferred individual rights to the tribe's members. *McCalanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973). There, the question before the Court was whether a state may tax a reservation Indian for income wholly derived from reservation activity. The lower Court found it irrelevant whether an individual Indian's rights were being infringed, but focused only on whether the tax infringed the Tribe's right to be self-governing. The Supreme Court rejected the lower Court's restrictive view and found the appellant's rights were violated:

> "To be sure, when Congress has legislated on Indian matters, it has, most often dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights."

Id. at 181.

Therefore, the treaties have conferred specific rights on individual tribal members. The arguments put forth by petitioner in support of tribal treaty rights merely support the tribe's own attempts to regulate its members. Petitioner has not shown that tribal regulations, as interpreted by state criminal courts, can deny important federal treaty rights to an individual tribal member.

C. State Courts are Not Appropriate Interpreters of Indian Tribal Regulations

Under petitioner's approach, in every prosecution for violation of fishing laws against treaty Indians, the state criminal court would be required to determine whether the defendant had violated any tribal fishing regulations. Such interpretation of tribal regulations by a state court is not appropriate given the historical conflict between the tribes and the states, *supra.*

Furthermore, it is remarkable that such an approach would be suggested by the States of Oregon and Washington, given their history of fighting against Indian fishing rights, *supra,* given the comments of the Ninth Circuit in comparing state efforts to frustrate Indian fishing rights to similar efforts in desegregation cases, *Puget Sound Gill Netters Ass'n v. United States District Court,* 573 F.2d 1123, 1126 (9th Cir. 1978), *affirmed* 443 U.S. 658 (1979), and given Judge Burns's statement that the recalcitrance of Washington State officials which produced denial of Indian fishing rights "should neither escape notice nor be forgotten." *United States v. Washington, supra.*

The petitioner's approach is particularly troublesome in the instant case, where the state was seeking to convict the three respondents of 100 years worth of felony offenses for violations of unspecified tribal regulations that were neither noted in the indictment nor at trial.

Finally, the comments of the Yakima Nation tribal prosecutor at a hearing in the instant case are appropriate: "it's difficult for me to understand why a sovereign would want to enforce another sovereign's regulations." Tr. 12/21/84 at 223.

For these reasons, petitioner's approach, whereby the state criminal court would construe tribal regulations in order to deny tribal members important treaty fishing rights, has never been adopted by any court except for the Oregon Court of Appeals in *Gowdy, supra.* Now that *Gowdy* has been overruled, *sub silentio,* in the instant case, the courts of all 50

states are in agreement. Therefore, there is no reason for this Court to allow the writ.

III.

This case presents an inappropriate factual record to address the issues raised in the petition.

A. There was no proof at trial that these defendants violated any tribal regulations.

At trial, the prosecution did not attempt to prove conservation necessity, but instead relied upon asserted violations of tribal regulations. However, as was pointed out by the defendants both at trial (Tr. 2/5/85, pp. 26-27), and before the Oregon Court of Appeals (App. Br. pp. 27-28), the prosecution never cited any specific tribal regulations upon which they were relying. More importantly, of the numerous tribal regulations introduced at trial (C.R. 171-172, Exhibit "A"), none are addressed to the specific acts committed by the defendants: possessing or selling fish out of season. Since the tribal regulations are only addressed to the act of fishing itself, the prosecution never proved that any tribal regulations were violated. Therefore, even under the approach presented by petitioner, defendants could not have been convicted of violations of state law. Accordingly, this case is an inappropriate one for review by this Court.

B. There was insufficient evidence presented at trial that the fish sold by the defendants were taken from the Columbia River.

The defendants were charged in ten indictments with possessing, receiving, and selling food fish from the Columbia River during a closed season in violation of Ore. Rev. Stat. § 509.011. The state attempted to prove that the fish were taken from the Columbia through two pieces of evidence: first, paragraph 1 of the stipulation, Exhibit I (quoted in the

Petition at pp. 4-5), indicates that on June 30, 1983, the defendants possessed or sold fish; second, paragraph 8 of the stipulation states that one of the fish seized on June 30, 1983 had a snout tag identifying it as having been released in March, 1979 in the Columbia River.

Apparently, the prosecution was relying on the folk wisdom that salmon invariably return to spawn in the same river where they were hatched. There was absolutely no scientific evidence submitted in support of this contention at trial. Furthermore, there was no request made that the trial court take judicial notice of this "fact", nor did the trial court take judicial notice on its own. Defendants disputed this "evidence" both in the trial court (Tr. 2/5/85, p. 29) and in the Oregon Court of Appeals (App. Br. p. 28-29).

Therefore, this case is an inappropriate one for review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LAWRENCE MATASAR
Hoffman, Matasar & Glaeser
1020 S.W. Taylor
Suite 330
Portland, Oregon 97205
(503) 222-9830
Counsel for respondents

Supreme Court, U.S.
FILED
MAR 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1414

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

STATE OF OREGON,

Petitioner,

v.

MARY SETTLER, CARL SETTLER, and RANDY ALVIN SETTLER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

BRIEF OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

KENNETH O. EIKENBERRY
Attorney General

*THOMAS F. CARR
Sr. Assist. Attorney General

Temple of Justice
Olympia, Washington 98504
(206) 753-2498

*Counsel of Record

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

98W

QUESTION PRESENTED

May state criminal defendants who violate both tribal and state law by selling fish caught out of season be acquitted, nevertheless, on the legal basis that they were exercising their tribe's treaty right?

TABLE OF CONTENTS

	Page
Question Presented	i
Interest of the State of Washington as Amicus Curiae	1
Reasons for Granting Oregon's Petition	2
Conclusion	5

TABLE OF AUTHORITIES

Puyallup Tribe v. Washington Game Department, 391 U.S. 392 (*Puyallup I*) (1967)	1
Puyallup Tribe v. Washington Game Department, 313 U.S. 44 (*Puyallup II*) (1973)	1
Puyallup Tribe v. Washington Game Department, 433 U.S. 165 (*Puyallup III*) (1976)	1,3,4
State v. Courville, 35 Wash.App. 615, 676 P.2d 1011 (1983)	3,4
State v. Jim (Warner), 81 Ore.App. 177, ___ P.2d ___ (1986)	5
United States v. Washington, 459 F.Supp. 1020 (W.D. Wash. 1978)	3
United States v. Winans, 198 U.S. 371 (1905)	1
Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979)	1,2

No. 86-1414

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

STATE OF OREGON,

Petitioner,

v.

MARY SETTLER, CARL SETTLER, and RANDY ALVIN SETTLER,

Respondents.

BRIEF OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF STATE OF WASHINGTON AS AMICUS CURIAE

The State of Washington today finds itself in direct government-to-government relationships with 22 Northwest Indian tribes which claim off-reservation fishing rights under a series of treaties entered into the mid-1850's. These treaties are known generally as the "Stevens Treaties," so called after Isaac Stevens, territorial governor and chief negotiator for the United States at that time. The nature and extent of the tribal fishing right reserved under the Stevens Treaties has been the subject of extensive litigation. *See, e.g., United States v. Winans*, 198 U.S. 371 (1905); *Puyallup Tribe v. Washington Game Department*, 391 U.S. 392 (*Puyallup I*) (1967); *Puyallup Tribe v. Washington Game Department*, 414 U.S. 44 (*Puyallup II*) (1973); *Puyallup Tribe v. Washington Game Department*, 433 U.S. 165 (*Puyallup III*) (1976); *Washington v. Wash-*

ington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979).

In recent years, state officials in Washington have undertaken to seek negotiated settlement of a variety of complex state-tribal fishing disputes arising under the Stevens Treaties. The success of these efforts is dependent upon the tribes' ability to bind their members to tribal regulations. One obvious goal of the state in such arrangements is achievement of mutually satisfactory tribal self-limitation in areas where the full measure of the tribal fishing right is seriously disputed by state and tribal parties. Negotiated tribal self-limitation is an attractive alternative to further litigation. One major beneficial result is clearer definition of when a given individual is exercising his or her tribe's reserved fishing right, and is thus subject to tribal or state regulation.

The treatment of this case by the Oregon Court of Appeals and the Oregon Supreme Court adds serious confusion to the body of law developed under the Stevens Treaties. If not reviewed by this Court, this case will be a major disincentive to negotiate state-tribal fishing disputes in Washington (as well as in Oregon and Idaho, we presume). If individual members of treaty Indian tribes may, as here, violate tribal regulations governing off-reservation fish sales and still be permitted to assert a successful treaty right defense to state regulation or state criminal prosecution, a major state objective in tribal negotiations will simply be removed, with resulting increased likelihood of extensive federal court litigation of numerous state-tribal fishing disputes which remain.

REASONS FOR GRANTING OREGON'S PETITION

The Oregon Court of Appeals has answered "Yes" to the Question Presented at the first page of this brief. By selling fish out of season, the Respondents clearly violated tribal law. Nevertheless, since the prosecution did not introduce evidence to overcome Respondents' personally-as-

serted treaty right defense, the appellate court held that motions for acquittal had been improperly denied. *See*, Petition for Writ of Certiorari, App-3. The Oregon prosecution should never have been required to overcome such a defense.

The lower court decisions in this case inherently reflect continuing confusion over the basic nature of the off-reservation tribal treaty fishing right. Is the right truly tribal and communal in nature, and thus derivatively exercisable by tribal members only under tribal auspices? Or is it exercisable by individual tribal members to the fullest potential extent, without regard to formal tribal action or inaction? The Oregon Court of Appeals took the latter view. In doing so, it failed to account for the contrary view taken by this Court in *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 658 (*Puyallup III*) (1979).

More confusion on this point results from at least one recent decision of the Washington Court of Appeals, *State v. Courville*, 36 Wash.App. 615, 676 P.2d 1011 (1983). That case involved members of the Muckleshoot Tribe who were prosecuted for possession of shellfish in excess of state regulations. Invoking essentially the same treaty clause as did Respondents here, the *Courville* appellants satisfied the court that they were entitled to assert a treaty right defense since the shellfish were taken at their tribe's "usual and accustomed" fishing grounds, even though an order of the United States District Court for the Western District of Washington then prevented (and still prevents) the Muckleshoot Tribe and all other Washington treaty tribes from engaging in off-reservation shellfish gathering prior to a preliminary determination of their right to do so by that court. *See United States v. Washington*, 459 F.Supp. 1020, 1037 (W.D. Wash. 1978). Allowing the defense to be raised anyway, the state court held at 36 Wash.App. 615, 621-622:

> "* * * treaty fishermen may raise a treaty defense when charged with unlawful possession of shellfish *even though their tribe has not received a prelimi-*

> *nary determination of such right* in federal court * * *
>
> The language in [the federal court's order] appears to require the treaty tribes to adhere to a specific procedure prior to exercising their "power to regulate their own members and to arrest violators of their regulations apprehended on their reservations or at usual and accustomed fishing sites." [Cites omitted.] *This would not affect or restrict individual tribal members' substantive rights under their tribe's treaty rights.* That prior adjudication of a treaty right is not a prerequisite to the assertion of a treaty defense is further evident by the fact that the treaties are self-enforcing and became obligatory on the parties when ratified. [Cites omitted.]"

(Emphasis added.)

Like our petitioning sister state, Oregon, we think it is logically clear and necessarily implied that a tribal member who violates a tribal regulation governing off-reservation treaty fishing activities is not exercising any protected right of the tribe. Accordingly, we subscribe to the contents of the Petition for Writ of Certiorari at pp. 11-14. It does deserve emphasis, however, that this Court has already taken a decidedly different view from that of the Oregon and Washington appellate courts. In *Puyallup III*, *supra*, this Court acknowledged the tribal character of the treaty fishing right, stating:

> The [45%] limitation on the size of the net catch applies to all members of the Tribe. The [State of Washington] has no interest in how the catch is allocated among the Indians. Its concern is with the total number of steelhead netted during each season, with obtaining information to make it possible to recommend a proper allocation in succeeding years, and with enforcement against individuals who may net fish after the allowable limit has been reached * * *

433 U.S. at 178. The proper rule of law was even more succinctly expressed by Judge Rossman of the Oregon Court of Appeals in *State v. Jim (Warner)*, 81 Or.App. 177, ___ P.2d ___ (1986). There concurring in the affirmance of a state criminal conviction of another treaty tribal fisherman, Judge Rossman simply stated:

> Defendant caught fish [off-reservation] during a closed [state] season under a Warm Springs tribal permit which allowed him to catch fish only for ceremonial purposes and to sell them only to the tribes. He violated the terms of the permit by selling the fish commercially. He thereby violated [Oregon State law] unless some tribal right protects him from state prosecution. Because his actions were beyond the authority which the tribal permit granted, he has no tribal immunity. He is therefore subject to state law. That is where this case should end.

81 Or.App. at 184.

CONCLUSION

For the reasons set forth, the State of Washington as amicus curiae urges this Court to grant the Petition for Writ of Certiorari.

DATED this 27th day of March, 1987.

KENNETH O. EIKENBERRY
Attorney General

THOMAS F. CARR
Sr. Assist. Attorney General
Attorneys for State of Washington
AC 206, 753-2498